PUBLIC PROSECUTOR

v.

ABDUL KUDUS JAPLUS

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CASE NO. ACDO 857/83]
11 MARCH 1988

CRIMINAL LAW: *Dangerous Drugs - Accused in possession of 15.87 grammes of heroin - Whether the whole amount belonged to him - Accused drug addict.*

The accused was detained at an ambush. A bunch of 3 keys was recovered from him. The accused was taken to his house where he used one of the three keys from the bunch of keys to unlock the door to a room. The accused used another key to unlock a cupboard in the said room. He also showed a brief case which was unlocked. The brief case contained 2 black coloured receptacles and a white tissue paper in which was wrapped 7 plastic packets. A rubber band was round the tissue paper package. The two black coloured receptacles and the 7 plastic packets contained a granular substance. When the evidence adduced by the prosecution considered cumulatively showed that the accused had exclusive knowledge as to where the drugs were kept, consistent with the inference that he had possession of the drugs which had been discovered. The defence was that the heroin in the two black receptacles in the brief case belonged to the accused for his own consumption but the 7 packets of heroin wrapped in the tissue paper belonged to his younger brother who was also a drug addict; accused had given permission to the younger brother to keep drugs in his briefcase which was kept locked in his (accused's) room.

Held:

[1] The defence story that there was an arrangement between the accused and his brother is not implausible. Therefore the defence has succeeded in raising a reasonable doubt on the prosecution's case that the accused was in possession of all the drugs in the brief case.

[2] However as the accused has admitted to the possession of the 7.82 grammes of heroin found in the two black receptacles in the brief case, he was found guilty and convicted and punished under s. 39(A) of the Dangerous Drugs Act 1952.

Cases referred to:

Yee Ya Mong v. PP [1972] 1 MLJ 120
Pulukuri Kotayya v. King Emperor [1974] AIR PC 62
Chong Soon Koy v. PP [1977] 2 MLJ 78
Dato Moktar bin Hashim v. PP [1983] 2 MLJ 233; [1983] CLJ (Rep) 101
R. v. Golder [1961] CV App R. 45
R. v. Jackson [1964] Qd R. 26
Driscoll v. R [1977] 51 ALR 731
R. v. Pestano and Ors [1981] Crim LR 397
Homeshwar Singh v. Kameshwar [1935] PC 146
Muthusamy v. PP [1948] MLJ 57

Legislation referred to:

Dangerous Drugs Act 1952, ss. 12(2), 15(a) 37(d), 37(da)(i), 39B(1)(a), (2)
Evidence Act 1950, ss. 27, 145, 155(c)

Other source referred to:

Cross on Evidence, 5th Edn., p. 244

For the public prosecutor - Zaini bin Abdul Rahman, DPP
For the accused - Sidney Augustine

JUDGMENT

KC Vohrah J:

The accused was charged as follows:

> That you on 6 September 1983 at about 11.00 p.m. at No. 29, Persiaran Keramat Hujung, Kampong Datok Keramat, in the Federal Territory of Kuala Lumpur, on your own behalf, did traffic in a dangerous drugs, to wit 7 plastic packets and 2 plastic receptacles of heroin weighing a total of 15.87 grammes and that you have thereby contravened s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised Act 234/80) and punishable under s. 39B(2) of the same Act as amended by Act A 553 of 1983.

The evidence was that the accused was detained at an ambush at Jalan Raja Muda, Kuala Lumpur near the Institute of Medical research at about 10.30 p.m. on 6 September 1993. A bunch of keys (P12) of 3 keys was recovered from his right trousers' pocket and he was asked by Inspector Moktar (PW4) who had detained him and found the bunch of keys,

> Ada tak lagi dadah disimpan di rumah kamu?
>
> ("Are there any more drugs kept in your house?")
>
> The accused replied,
>
> Ada.
>
> ("Yes.")

PW4 and his team comprising Detective Corporal Zaharin (PW5), Detective Constables Zakee and Kamaruddin then proceeded with the accused to a house No. 29, Persiaran Keramat Hujung, Kampong Datok Keramat, Kuala Lumpur. They went to the back door of the house. The accused then called out of his younger brother, Idris bin Japlus, who let them in.

The accused then showed PW4 and two of his team, Corporal Zaharin and DPC Zakee, a room in the house on the ground floor.

The accused had his hands handcuffed to the back then. He was re-handcuffed with his hands in front by DPC Zakee on PW4's instructions. The accused then used one of the three keys from the bunch of keys (P12), recovered by Inspector Moktar from his pocket, to unlock the door to the room.

In the room PW4 asked the accused,

> Where are the drugs?
>
> The accused answered,
>
> Inside the cupboard.

PW4 tried to open the left door to this cupboard but found it was locked.

PW4 then instructed the accused to use one of the keys from the bunch of keys to unlock the left door of the cupboard. The door was unlocked through the use of one of the keys.

The accused then showed PW4 a brief case which was inside the cupboard. PW4 tried to open it but found it was locked; the brief case had a combination lock on either side of the brief case. With the assistance of the accused who gave the combination numbers, "100" for the left lock and "101" for the right lock, the brief case was unlocked.

PW4 found in the brief case 2 black coloured receptacles (P7 and P8) and a white tissue paper (P4) in which was wrapped 7 plastic packets. A rubber band (P9) was round the tissue paper package. The two black coloured receptacles and the 7 plastic packets contained a granular substance. There was nothing else in the brief case.

A search was made of the room which had a wooden platform with a mattress on it and no other incriminating thing was found in the room.

The accused and the seized items were then brought to the Jalan Bandar Police Station.

The relevant facts so far recounted came from the evidence of PW4, Inspector Moktar.

Detective Corporal Zaharin, PW5, recounted substantially the same facts relating to the detention of the accused at Jalan Raja Muda, the discovery of the bunch of keys in his right trousers' pocket, the answer "Yes" by the accused to PW4's question whether there were more drugs in his house, their going to the house, the opening of the back door by Idris, the bringing by the accused of the police to a room, the unlocking of the door to this room by the accused using one of the keys from the bunch of 3 keys recovered from his pockets and the unlocking of the left cupboard door by the accused who used another of the keys from the bunch. PW5 said that PW4 had asked the accused, "Where is the drug you have kept?"; and the accused replied "In this cupboard."

He said the cupboard had two doors and upon PW4's instruction the accused unlocked the left door of the cupboard, took out a brief case which he handed to PW4, Inspector Moktar. PW4 instructed the accused to unlock the brief case which he did and two black coloured receptacles and a white tissue paper package in which was wrapped seven plastic packets were found in the brief case.

PW5 said that the other side of the cupboard was not searched as the right door was not opened. He said after his arrest, at the office, the accused stated that he was a drug addict.

The investigating officer of this case, Inspector Dzulkifli, PW2, stated that two days after the arrest of the accused he went to the said house with PW4, PW5, a police photographer (PW3) and the accused. He used one of the keys in the bunch of keys (P12) to unlock the door to a room and he saw a wooden platform with a mattress on it. He also saw a cupboard with 2 doors. PW2 recovered from the left side of the cupboard a wallet (P15) which contained a birth certificate (P16) in the name of Abdul Kudus bin Japlus (the name of the accused) and a photograph (P17). On the platform in the room he found a plastic name tag (P18) bearing the words.

Apa Supervisor 45 Abd. Kudus Hj. Japlus

PW5 also stated that he sent the granular substance in the 7 plastic packets (P5A to G) and the two receptacles (P7 and P8) to the chemist for analysis.

According to the chemist, Encik Khoo Ah Kow, after analysis of the substances in the 7 plastic packets and the two other receptacles, he found the substance in the 7 packets (P5A to G) to contain 8.05 grammes of heroin and the substances in the two other receptacles P7 and P8 to contain 3.86 and 3.96 grammes of heroin came to 15.87 grammes.

Defence Counsel had objected to the admissibility of the evidence regarding the question put by Inspector Moktar to the accused whether there were any more drugs in his house and the accused's reply "Yes". His objection was that the information by the accused did not lead to the "recovery" of the drug and that on the basis of *Yee Ya Mang v. PP* [1972] 1 MLJ 120 the thing recovered should in the first place have had the characteristic feature

of having being "hidden". With great respect to learned Counsel, the provisions of s. 27 of the Evidence Act 1950 have been miscontrued and *Yee's* case did not decide that the thing recovered must in the first place have been "hidden". Having regard to the case of *Pulukuri Kotayya v. King Emperor* AIR 1974 PC 62 and *Chong Soon Koy v. PP* [1977] 2 MLJ 78 the bit of information given by the accused is admissible under the provisions of s. 27 of the Evidence Act 1950 as the "fact deposed as discovered" mentioned therein was not only the heroin in the house but the knowledge of the accused as to this; and the information that drugs were kept in his house supplied by the accused to Inspector Moktar distinctly related to the discovery of this heroin in the where it was kept.

Before dealing with the question whether a *prima facie* case against the accused on the charge had been made, I would like to deal with the evidence of the various prosecution witnesses adduced during their cross-examination. It was established that on the night the room was searched and the heroin discovered, only that room was searched; no other place in the house was searched. It was also established that no investigation had been made to find out if anyone else had duplicates of the keys in the bunch of keys seized from the accused; and Inspector Moktar stated that he did not know if anyone else had access to the room nor which room Idris, the accused's brother, was occupying. It was also established that Idris had been a drug dependant for a long time and that on 16 February 1988 he had been released from Pudu Prison after serving sentences for the possession of heroin and for administering heroin to himself; this was so stated by Inspector Dzulkifli also stated that he had occasion to detain Idris "in connection with heroin" after the accused had been arrested. With regard to the accused, Detective Corporal Zaharin did state that the accused had told him he was a drug addict in the office of the police station on the day of his interest but he said he did not know if the accused was a drug addict.

Nothing however in the evidence adduced through cross-examination, to my mind, affected the prosecution's *prima facie* case to the close of its case. It is of course clear that the bit of information about more drugs being kept in the house and the other bit about the drugs being in the cupboard supplied by the accused led to the discovery of the heroin in a brief case kept in the cupboard in a room in the house. But these bits of information coupled with the discovery of the drugs, however, were merely indicative of the fact that the accused had knowledge of the drugs kept in the brief case not that he had possession, control or custody of the drugs. The prosecution, however, did not rely on these bits of information which led to the discovery of the drugs as the foundation of its case against the accused. The prosecution also relied on other primary facts, which considered cumulatively, showed that the accused had exclusive knowledge as to where the drugs were kept, consistent with the inference that he had possession of the drugs which had been discovered. There was the evidence that the accused had himself unlocked the brief case, using the digits "100" and "101" to unlock the left and right combination locks respectively of the brief case from which heroin was recovered. There was also the evidence that he unlocked the door to the room using a key from the bunch of keys which was recovered from him. It was also in this room that the name tag of the accused was found. The accused unlocked the left door of the cupboard and it was in this left side of the cupboard that the brief case was kept. It was also in this left side of the cupboard that the investigating officer, PW2, discovered a wallet which contained the accused's birth certificate. It seems clear that the bits of information given by the accused which led to the discovery of the drugs in the brief case when linked to these primary facts showed that the accused had possession of the heroin found in the brief case. The prosecution's case was not inherently incredible and to my mind a *prima facie* case of trafficking as specified in the charge had been made out bearing in mind the

presumption under s. 37(d) of the Dangerous Drugs Act 1952 that he knew the drugs were heroin and the presumption under s. 37(da)(i) that he was trafficking in the 15.87 grammes of heroin. I called upon the accused to make his defence on the charge.

Defence

The accused elected to give sworn evidence.

In gist his defence was that the heroin in the two black receptacles in the brief case belonged to him for his own consumption but that the 7 packets of heroin wrapped in the tissue paper belonged to his younger brother Idris who was also a drug addict; he had given permission to Idris to keep drugs in his brief case which was kept locked in his (accused's) room.

The accused stated that he was a drug addict since 1974 when he started on ganja. He then became a heroin addict and when he took part as stunt man in dangerous stunts in movies the heroin made him more confident and brave. His addiction landed him with 3 previous convictions for possession of heroin and his possession for heroin in each of the 3 cases was for his own consumption. He said his brother Idris who had been a commando in the army was also a drug addict since 1978 and he and his brother had undergone "traditional treatment" to kick their habits to no avail.

He said that 4 to 5 months prior to his arrest he shifted to a room which had been added to the house sometime in 1980 to serve as a prayer room for his father. The room was also used as a store for old clothes and books. Before that he occupied a room at the back of the house with his 3 brothers; this included Idris save for the time idris was in the army. Since he was a drug dependant and since he always went to bed late - and his brothers sometimes had to sleep in the hall on his account - he decided to shift to this room. One night after he had shifted to the room he discussed with Idris the reason for his shifting; he also told him that he did not wish his family to get into trouble on account of his and Idris' addiction to drugs and he told Idris if Idris had drugs he should not keep them in the room which Idris occupied but Idris replied that he had no other place to keep the drugs. The accused said he then made the decision that Idris could keep his drugs temporarily in his (accused's) brief case in his (accused's) room and that the drugs could only be kept during the daytime. This related to the excess drugs not needed for the day's consumption; he said Idris took heroin four times a day. He then gave the combination digits to the locks of the brief case. And he told Idris to get spare keys to his room and his cupboard from the keys in a drawer of the kitchen cabinet and he instructed him to replace them in the drawer after use.

He said that for himself he kept drugs for his own consumption in two film plastic containers, P7 and P8, which were in the brief case. He said on 2 or 3 occasions when he went to take drugs during the daytime for his own consumption he saw a small package in the brief case on each occasion which he believed to be Idris'.

He said on the day of his arrest he left home in the morning after taking a bit from his stock for his own consumption from the black receptacles and at that time the package was not there.

The accused's brother, Idris, DW4, said that the 7 packets of drugs in the brief case were his. He recounted that he was in the army as a commando from 1981 until 1983 when he was dishonorably discharged from the army having been absent without leave because of his involvement in drugs. He said he started taking drugs before he sat for his school examination in 1975. He had started on ganja and had gone on to heroin. When he joined the army in

1981 he was a drug addict. He consumed less drugs while undergoing training until he succeeded in kicking the habit but later he became addicted again. And when he was discharged from the army in 1983 his drug addiction was worse then before. He said he had just been released from prison on 16 February 1988 after having served concurrent sentences on a charge of being in possession of heroin and another charge of having administered a (dangerous) drug to himself.

Idris said that 2 or 3 months before the accused's arrest the accused told him that if he had any drugs he should not keep them in the room where he (Idris) slept with his two other brothers as "he did not want my other two brothers to get to involved in case anything happens." Idris said that the accused advised him that if he possessed drugs he could keep them in a bag in the cupboard in his room as it would be safer. Idris explained that his cupboard in the room he shared with his two other brothers had no lock. He said the accused gave him the combination digits to the locks of his bag. the accused told him to make use of the keys kept in the kitchen cabinet to unlock the doors to his room and the cupboard. Idris tested the keys from the drawer and found they fitted the relevant locks. He said the accused told him that "if I wanted to keep my drugs there for one day it is okay."

Idris said that prior to the day a of the arrest of the accused he had kept drugs in the accused's brief case on 2 or 3 occasions. He said he normally kept 2 to 3 packets, and a packet would normally have lasted 3 to 4 days. Normally he would take some and keep the rest outside the house. He said on 6 September 1983, the date of arrest of the accused, he had purchased 7 packets of drugs, a large quantity than he had previously purchased; he had the 7 packets from a friend at a special price and he had kept them in the brief case after wrapping them in a soft tissue paper and putting a rubber band round it pending seeking the accused's advice whether he could keep the drugs in accused's brief case longer than 1 day. He said he was waiting for the accused to come back that night to seek the accused's advice and the accused however came back to the house with the police. He informed his father, DW3, about the accused's arrest on the morning of 7 September 1983 and admitted to his father that the 7 packets of drugs were his. He said his father told him to admit to the possession of the 7 packets to the police but he was afraid and confused and he did not inform the police about it. He showed his father the spare keys and his father told him to keep them for safe keeping in a cupboard until they (D22 and D23) were produced in Court.

It has to be stated here that Idris admitted he lied to Inspector Dzulkifi on several points when he gave a statement to him in 1983 stating that he had never gone to the accused's room when the latter was not in the room, that he had never kept anything in the accused's room, that the drugs in the accused's brief case did not belong to him and that he did not have any duplicate key to the cupboard where the drug (in the brief case) was discovered.

His credit was sought to be impugned under ss. 145 and 155(c) of the Evidence Act 1950. The Federal Court in *Dato Moktar bin Hashim v. PP* [1983] CLJ (Rep) 101 has held that when a witness's credit is sought to be impugned under the said provisions his credit stands to be assessed as a whole together with the rest of the evidence at the appropriate stage, that is to say, at the close of the case for the prosecution or for the defence, as the case may be. I thus have to assess Idris' credit by viewing his evidence as a whole together with the rest of the evidence.

Now, Idris made previous statements which inconsistent with his evidence in the trial. Should the Court, which acts as Judge and jury, treat his evidence in the trial as unreliable? In *R. v. Golder* [1961] 45 Cr App 5 the English Court of Appeal decided that a jury should receive

a clear warning that "when a witness is shown to have made previous statements inconsistent with the evidence given by that witness, **the jury should** not merely **be directed that the evidence given at the trial should be regarded as unreliable;** they should also be directed that the previous statements whether sworn or unsworn do not constitute evidence upon which they can act."
(emphasis mine).

The first part of the above statement, if it was intended to be an inflexible rule, was considered by the author of *Cross on Evidence* 5 Edn., p. 244 as questionable because allowance must at least be made for the case in which the witness gives a *prima facie* satisfactory explanation of the inconsistency, relying on remarks in *R. v. Jackson* [1964] Qd R 26 which were approved in the High Court in Australia in *Driscoll v. R* [1977] 51 ALR 731. In 1981 the rule in Golder was however modified in *R. v. Pestano and Ors.* [1981] Crim LR 397. In this case a prosecution witness having incriminated two of the defendants, in part resiled from his deposition in so far as it affected the other two Prosecution Counsel then asked various questions designed to show that the witness was lying before making a successful application to treat him as hostile. He was asked about his deposition and another deposition in a different case. The witness did not return to the account given in his deposition but the prosecution nevertheless continued to rely on his evidence in so far as it advanced their case. In dismissing the appeals, the Criminal Court of Appeal held that the evidence was for the jury to consider subject to a proper warning from the Judge as to the weight, if any, which could be attached to it.

And in assessing his credit I would also have to bear in mind the privy Council case of *Homeshwar Singh v. Kameshwar* [1935] PC 146 where it was held that if a witness denies a fact in the course of his evidence and it is proved that on a previous occasion he made a statement admitting it, that does not prevent his deposition from going in as evidence in the case, though it weakens its value so far as to make it unsafe to act upon it without corroboration.

Needless to say whatever my assessment of his credit, his various denials in the police statement cannot become his evidence (see *Muthusamy v. PP* [1948] MLJ 57 at p. 58).

Reverting to Idris, in gist his explanation for his lies was that he feared that he with his severe addiction would be detained and that he would therefore be deprived of heroin; he also felt since "my brother had been arrested because of the drugs why should both of us be arrested; let him alone be arrested." His explanation for his lies has to be viewed in the context of his state of mind whilst being a drug addict. It is common knowledge that withdrawal symptoms suffered by a drug addict when deprived of his supply of drugs can be harrowingly painful and telling lies so as not to be deprived of his supply of drugs would not be unnatural. But his evidence which he gave during the trial should be viewed in the context of his having just been released from prison which, according to prisons officer DW2, was slightly over 2 weeks before Idris gave his evidence. I can take it that Idris was clear from the effects of drug addiction at the time he gave his evidence. Idris' explanation for his lies appears credible but his evidence in the trial has nevertheless to be treated with the utmost caution bearing in mind that I would have to seek corroboration of his testimony elsewhere.

The father of the accused, DW3, stated that both the accused and Idris were drug addicts and that he tried to get them cured through traditional treatment to no avail. He confirmed that on 7 September 1983 Idris informed him of the accused's arrest and that Idris admitted to him that 7 packets belonged to him. He had asked Idris to admit to the police if they

belonged to him but Idris had stated that if he were to inform the police about it he (Idris) would get involved too. He said Idris showed him where he got the keys to Kudus' room and cupboard and he told Idris to keep them in safe custody.

Another witness, DW2, the officer in charge of records at Pudu Prison stated that Idris was sentenced on 21 January 1988 to 12 months imprisonment for the offence of possession of dangerous drugs under s. 12(2) of the Dangerous Drugs Act and 9 months for another offence of self-administration of a dangerous drug under s. 15(a) of the same Act, the sentences taking effect from the date of arrest 18 June 1987.

I now come to the evaluation of the totality of the evidence. As regards the assertion that the accused was a drug addict at the time of his arrest I take into consideration that Detective Corporal Zaharin (PW5) had stated that the accused had told him that he was a drug addict. I have no reason to disbelieve the testimony of the accused and his father that he (the accused was a drug addict on the day of his arrest bearing in mind his admission that he had previous convictions for possession of heroin and the heroin was for his own consumption. That he was a drug addiction any event was not really seriously challenged by the prosecution. I also have no reason to disbelieve the evidence for the defence that Idris himself was a drug addict at the time of the accused's arrest; the father's evidence, not seriously challenged, corroborates the accused's and Idris' evidence that Idris was a drug addict before and at the time of the accused's arrest.

Before I deal with the main issue whether the 7 packets of drugs were Idris' and not the accused let me deal with the matter of the duplicate keys to the accused's room and the cupboard in his room. 2 bunches of keys (D22 and D23) were produced by Idris. Both the accused and Idris said that one key (D23A) from D23 was for the lock to the room and two from D22 were for the left and right locks of the cupboard. There was considerable effort on the part of the prosecution to show that the keys produced could not have been in existence at the time the accused was arrested. It will be remembered that during the prosecution's case the defence established that the police did not search for duplicate keys to accused's room and cupboard. That the duplicate keys to these were in bunches in a drawer of the kitchen cabinet at the time of the arrest of the accused is probable; most families leave spare keys for the various locks in their house either in the drawer of a cabinet in the kitchen, dining room or sitting room and in any event the police did not search any part of the house except the accused's room nor looked for duplicate keys.

But whether these keys were actually used by Idris to gain access to the accused's room and cupboard in order that he could keep his supply of drugs in the brief case is a different issue. This has to be viewed in the context of the defence story that after Idris was dishonorably discharged from the army he was still a drug addict and that the accused who was also a drug addict discussed with Idris that they should not jeopardise the family because of their drug addiction; and that the accused had told Idris not to keep his drugs in the room which Idris occupied with his two brothers but to keep them in a brief case in the accused's cupboard; the accused supplied the combination digits to the locks of the brief case and told Idris to make use of the spare keys, which were lying in a drawer of a cabinet, to gain access to his room and cupboard. This was the story of the accused and this, too, was the story of Idris. Idris whose evidence has to be treated with caution as previously explained, said he had related the matter of the discovery of drugs in accused's brief case and that he had admitted to his father that the 7 packets which were in the brief case were his and that he had used spare keys in a kitchen drawer, which he showed to him, to gain

access to the accused's room and cupboard. The father, DW3, gave similar unshaken evidence that Idris had told him these things. It seems to me that there could be some truth in that there was this arrangement between the accused and Idris where Idris could keep his supply of drugs which were not required immediately for his consumption for the day. It was an elder brother's concern for the rest of his family especially his two other brothers who shared the room with Idris that they should not be put into jeopardy. I can believe that Idris did have a cupboard lest there should be the prying eyes and inquisitive hands of his family especially those of his other brothers. But is it not strange that Idris was allowed to keep his excess drugs there only during the daytime and not at night? But then would it also not be a fair inference that Idris' physical presence in his room at night would deter his family especially his brothers from rummaging in his cupboard?

All in all the defence story that there was such an arrangement is not implausible and the assertion of the accused that the 7 packets of heroin in his brief case were Idris' and Idris' admission that they were his coupled with the evidence of their father that Idris admitted to him that the 7 packets were his could probably be true. In the result I find that the defence has succeeded in raising a reasonable doubt on the prosecution's case from which an inference from the primary facts had been drawn that the accused was in possession of all the drugs in the brief case.

But the accused has admitted to the possession of the 7.82 grammes of heroin found in the two black receptacles in the brief case. On his own admission which is believable I find him guilty and convict him for the offence of being in possession of 7.82 grammes of heroin without being so authorised under the Dangerous Drugs Act 1952 or the regulations made thereunder under s. 12(2) of the Act. He is to be punished under s. 39A as the provision stood on the date of his offence. Defence Counsel may now make his plea in mitigation.

Also found at [1988] 2 CLJ 812